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around Schlegel!*

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### Saying Thanks with Some Self-Reflection

John Henry Schlegel  
*University at Buffalo School of Law*, [schlegel@buffalo.edu](mailto:schlegel@buffalo.edu)

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## Saying Thanks with Some Self-Reflection

JOHN HENRY SCHLEGEL†

It would be best for me to begin with a character trait—perverseness. The easiest way to get me interested in something is to tell me that I should not pay attention to it. Thus, coming out of law school I should have been a Law and Society lifer.

The program at the law school of the University of Chicago, like most, was an exercise in doctrinal explication. We were pushed away from both Social Science and American Legal Realism, even though both were part of the school's heritage. In the contracts course I was exposed to excerpts from Stewart Macaulay's research on contracting practice, though absolutely nothing was done with that research. For me it was the only interesting thing in the course. My contracts teacher did not agree with me and graded my exams accordingly. Scratching around at the edges of the curriculum, I found an interdisciplinary seminar, the second best of the six seminars I took. It was about what we called the battered child problem and included time with a faculty member in the Medical School who did several classes on the etiology and diagnosis of battering. The law part was dumb. The even better seminar

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†This piece was prepared during the so far height of the Corona-19 virus outbreak, when it seemed more possible that I might not outlive this project. It still seems relevant and I wish to thank the *Buffalo Law Review* for letting me contribute it.

was one on statistical methods given by Hans Zeisel, taught out of his book *Say It with Figures*. That course has held me in good stead for 53 years. I became entranced with American Legal Realism in a contemporary jurisprudence seminar that otherwise convinced me that jurisprudence was a boring waste of time. A similar seminar devoted to H.L.A. Hart's *The Concept of Law* did not alter that opinion.

Of course, neither Social Science nor Realism was of any use in my five years in Legal Services practice. There I discovered that law was mostly routine, at least after I absorbed two years of writing lessons. The underlying economic and social problems were almost always far more interesting than the complaint and brief writing that occupied most of my time.

Once I got to Buffalo in 1973 the atmosphere was conducive to returning to the possible social science trajectory that had garnered my interest in law school. Mark Galanter's Friday seminar was the center of the intellectual life in the school. The speakers consisted primarily of Marc's young social scientist friends. Our Dean, "Red" Schwartz, the first law school dean who was not a lawyer, was central to the group that established the Law and Society Association. He and Marc organized the first "National Meeting" of members of the group. It was held here in Buffalo at the end of my second year on the faculty. This enterprise later became the LSA's Annual Meetings. And so—though some chance was involved—it is not surprising that I quickly began work on early social science research undertaken by the American Legal Realists.

I attended several Law and Society meetings and even gave papers there as late as 1986, but beginning in the early Eighties I began to drift away from the group. At the time I didn't understand why. I told myself that the Critical Legal Studies group seemed more interesting. Later, I came to understand that a significant amount of my lack of interest was because I couldn't endure, i.e. was bored by, the endless stream of research that demonstrated that there was a

difference between the law on the books and the law in action, as if Roscoe Pound had offered the final insight into law. The recurrent call for better law to close that gap left me equally cold. Instead, I wanted to see research that explored the reasons for the continuity of results that filled LSA's annual meetings. The group was also growing too large for my taste.

That the Critical Legal Studies group was more interesting at the outset was undoubtedly true. It was smaller. It was livelier. And it seemed at the time more likely to come up with good reasons for why law, as a practice, was as it was. I should have known that there was something wrong in the enterprise when at the group's first meeting most of the law and society types were pushed out, but I didn't. The growth of the group here in Buffalo with the addition of Fred Konefsky, Guyora Binder and Errol Meidinger, Betty Mench and Alan Freeman, in addition to Al Katz, my personal, skeptical Yoda, and for a brief while, Bob Gordon, made CLS feel like home, however much we argued with each other, and did we argue. Friendships beyond Buffalo—David Trubek, Duncan Kennedy, Peter Gable, Mike Fishel, Jay Feinman, Karl Klare, Kathy Stone and Gary Peller—gave me a sense of belonging to a national network that just might make some changes in how law was taught. Even more importantly, I felt excited by the implicit resurrection of the thought of the American Legal Realists who had so captured my interest when I was in law school by being told to stay away from that stuff.

I went to most of the early CLS meetings, even to an international gathering of the clan, and with Fred hosted a CLS meeting here in Buffalo, but I drifted away from CLS too, though somewhat later than from the Law and Society group. Again, at the time I didn't understand why. I told myself that the group gathered around the Test Development and Research Committee of the Law School Admission Council was more interesting. In time I came to understand that a significant amount of my lack of interest

in CLS was because the theory about the structure of doctrine that was initially so attractive to me became less attractive when I realized that the group was unwilling to turn that theory back upon itself after the growth of allied movements—Critical Feminism and Critical Race Theory—that asserted the groundedness of their critique, a groundedness that we had denied was possible in law. It didn't hurt that few of the crew wanted to talk about anything other than doctrine, which, by then, I had begun to avoid as much as possible in my classes, as I already had in my writing.

For a while the little group that I had found in LSAC was quite interesting and then it too wasn't. Watching really intelligent people work to build a better test was enlightening. But when I learned that better did not include different and different included grading scales that would make it hard for law schools to admit students just on the numbers, I pretty much gave up before being asked to leave. Though I kept some friends—George Dawson, Fred Hart, Dan Ortiz, John Portmann, Phil Shelton and Peter Winograd—in the end I was left with only history as a possible center to my academic identity.

I had long identified myself as an historian and irregularly attended meetings of the American Society for Legal History where I gave my first scholarly paper, an activity that I quickly came to despise. I was even then too old to be talked at and was not all that interested in associating with those who were not. Still, I acquired a wonderful group of friends there in addition to those who have taken the time to contribute to this odd enterprise—Laura Kalman, Mike Churgin, Bruce Mann, Avi Soifer, and Ray Solomon. The organization as a whole, however, was really quite stuffy and its meetings were of little interest to me because very few of its members were Twentieth Century historians. The most fun was sitting in the hallways reading my newspaper and talking with the friends who happened to pass by.

For me, the intellectual attractiveness of the group was its distance from a focus on law reform, a legal academic style that I call, stealing from my buddy Pierre Schlag, normative legal thought. It was another activity I could no longer stand since it was built on wishful thinking given that it treated as irrelevant the history and embeddedness of social and economic practice and ignored the possibility that all right thinking people might not think alike. It thus legitimated a purposeful ignorance of the concerns of non-right thinking people, and rejected all of those years of Law and Society research that, despite its practitioners' denial, pretty firmly demonstrated that legal doctrine was not a particularly good vehicle for altering the structure of American life. Even worse, it ignored the doctrinal work of Critical Legal Studies.

It is here where my perverseness needs to return to the forefront. After a while, I began to understand that for me Critical Legal Studies was attractive because the Law and Society people didn't approve of it and Law and Society was attractive because Critical Legal Studies people didn't approve of it. Thus, it is not even slightly surprising that I became attracted to post-modern thought because a portion of both the Law and Society and Critical Legal Studies crowds didn't approve of it. Katz's interest in Foucault had been a part of my intellectual life for a while and then, in the late Eighties, I met, first in print, then in person, Pierre, who was more interested in Derrida and Barthes than Foucault. Acceptance of post-modern thought was thus a "threefer," since the historians wish to be seen as practitioners of a social science meant that fancy French thought was snubbed there too. Even worse, no one other than Duncan and Peter seem to have been interested in the Existentialism from my youth that somehow bubbled up from somewhere in my head at about the same time as post-modernism did.

I have come to think that my susceptibility to French thought coming out of the darkness of the 1930's and World War II could be explained by my having grown up in the years when school children were ordered to do something so

obviously irrational as to hide under our desks and cover our heads in case of an atomic attack. One learns to go on despite the possibility of oblivion. It was the only sensible thing to do. The otherness of the other thus seemed obvious too, as did the necessity for making Kierkegaard's leap of faith and the importance of Buber's *Thou*. Somehow all these things fit with the necessity to escape from the totalitarian subjection of the text in its polymorphous perversity and from the equally totalitarian grip of disciplinary boundaries of thought, two of many quite minor correlatives that followed from an example of reason gone mad.

And so, for about twenty-five years I have pretty much had to find my way on my own with the understanding that, as is the case for all people, I speak from my non-privileged position, a place I have perforce had to choose. Hopefully, I have chosen well. The results may not be pretty, but this is about where I come out in my life with law.

1. To see and teach law as a system of rules is a category mistake. Not that there are no rules or that they are not relevant to the doing of law, but rather that their meaning is not an analytic, linguistic or philosophical matter. Law gets its meaning in and from the social, economic and historical context in which it is to be found . . . and vice-versa.

2. In such a world, the rule of law is best seen not as the law of rules, but as a desire for not perfect, but reasonable administrative regularity in any aspect of government.

3. Thus, the space between the law on the books and the law in action might best be understood as instantiating the following proposition: Law enacts the dominant culture and if not, that culture modifies law. No culture is wholly coherent; so to expect that law be coherent is silly. And it is in that in-between space that an opposition to the totalitarian tendency embedded in "It's the LAW!" can be found.

4. So, for me both Law and Society and Critical Legal Studies fundamentally misunderstood law, though in similar

ways. Both took the rules as rules too seriously. One should expect that there will be a space between the law on the books and the law in action. Similarly, one should expect that the rules will work to enact the dominant culture. It would be really notable were one to find that these two propositions were not true. In the former case one would worry about an authoritarian government and in the latter, a repressive utopian society.

5. Similarly, law is best seen and taught not as a system of rules to be justified by the professorial cast, but rather as a practice, an activity of humans exercising judgment in a time and place when trying both to secure actions deemed by them to be beneficial to themselves or detrimental to others and/or to alter or reinforce the dominant culture, by gaining the aid of governmental action. Both are perfectly acceptable activities for humans and are regularly seen in the nation states of the North Atlantic.

6. The teaching of law has long, perhaps forever, decentered the exercise of judgment—good, bad and indifferent—from the practice it purports to teach, but more accurately understood, to help others learn. This sidelining of judgment has always been a problem for understanding law, defensible only in terms of a perhaps intentionally misleading conception of the rule of law, but more likely in terms of a refusal to face the problem that is judgment, that of openly giving disputable reasons for coercive actions taken with often mixed motives.

7. The displacement of judgment *in the individual case* with normative legal thought's focus on *the general case* presents two problems. The first is the dubious notion that as a condition for the receipt of a license to practice law, a trade, everyone should be required to pay good money to listen to the law professoriate's understanding of what qualifies as good law. Doing so is an embarrassment. The second is the implication that comes from partial critique undertaken in the doctrinal classroom each day that the great balance of law is justified, or at least justifiable, an



insidious notion in the hands of once students who have swallowed whole the proposition that the rule of law is the law of rules. Doing so leads to rule mongering of the most blatant type.

But this is not all I think I have figured out, for in a different, but related register I would argue --

8. Just as law seen as a system of always effective rules can be totalitarian, the ways of knowing about it and the world that it instantiates and that instantiates it can be equally so. And for the same reason. Reason, and its good friend critique, has in itself the capacity for totalitarian behavior, since it demarks that which it sees as unreason, based solely on its self-understanding of the world that it surveys, a self-understanding that it labels "truth." "Error" I can accept, but not "truth," for "truth" is a demarking of what can and can't be known, especially disciplinarily. Such a demarking is bad because it negates the possibility that so-called error just might better explain what is thought to be already known, as well as make understandable that which is, by the definition of truth, unknown and unknowable.

9. That opening to the unknown, that action requiring a leap of faith in resistance to the taken-for-granted of academic life in the bureaucratic university, is what gives meaning to the activity of learning that is both teaching and research, an activity to which each of us has devoted a life.

10. (Available for future learning.)

And so, as Siegmund Warburg said, "The greatest adventure is thinking." With that observation in mind, I am pleased to assert as loudly as my voice will carry, a fairly far way as I have learned, that I have enjoyed thinking with all of you. May we all continue to be able to keep at it!